

FILED BY CLERK

FEB -8 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0237-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LISA NARCHO,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20080948

Honorable Gus Aragon, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean

Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Lisa Narcho pled guilty to aggravated driving under the influence of an intoxicant while her privilege to drive was suspended or revoked. The trial court sentenced her to a presumptive term of 2.5 years in prison. In this petition for review, she challenges the trial court's dismissal of her subsequent petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We review the court's ruling for an abuse of discretion. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Finding none, we deny relief.

¶2 As she did below, Narcho contends her trial counsel was ineffective in failing to fully present evidence of mitigating circumstances at the sentencing hearing. Specifically, she contends that, although counsel spoke about Narcho's son, who has Down Syndrome, counsel failed to mention Narcho's other children, who have or have had health issues as well. Narcho also contends counsel failed to fully explain her efforts to overcome her alcoholism, stating only that Narcho had sought counseling at Alcoholics Anonymous (AA), but failing to mention that Narcho had actually participated in AA while in jail and also had participated in a substance abuse program through the Pascua Yaqui Tribe. Finally, she contends counsel failed to explain fully that Narcho has "suffered from depression for years, has sought treatment for this condition, and has taken antidepressant medications" that have not been effective.

¶3 A "strong presumption exists" that counsel provided effective assistance, and a defendant has the burden of overcoming that presumption. *State v. Bennett*, 213 Ariz. 562, ¶¶ 21-22, 146 P.3d 63, 68 (2006). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was both

deficient, based on prevailing professional norms, and prejudicial, that is, the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A defendant's failure to satisfy either element of this test defeats the claim, and we need not determine if the remaining element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶4 The trial court denied relief following an evidentiary hearing, finding Narcho had failed to show either deficient performance or resulting prejudice. Although the court found defense counsel may have left out “some details” in her presentation of the mitigating circumstances, it found counsel's performance had been professionally reasonable. Further, it made clear that, even if defense counsel had presented the additional evidence at the sentencing hearing, it would have imposed the same sentence, stating: “After considering all of the evidence and expert testimony [presented at the evidentiary hearing], this Court sees no reason to deviate from the term imposed.” Thus, even assuming for sake of argument that counsel performed deficiently in presenting the mitigating circumstances, Narcho failed to establish she was prejudiced thereby. The trial court did not abuse its discretion in dismissing Narcho's petition and denying relief on this claim.

¶5 Although we grant Narcho's petition for review, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

GARYE L. VÁSQUEZ, Judge

J. WILLIAM BRAMMER, JR., Judge